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07 UNITED STATES DISTRICT COURT
08 WESTERN DISTRICT OF WASHINGTON
09 AT SEATTLE

10 DAVID V. GARRISON,

11 Plaintiff,

12 v.

13 JO ANNE B. BARNHART, Commissioner
14 of Social Security Administration,

15 Defendant.

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) Case No. C05-1489-JLR-JPD
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) REPORT AND RECOMMENDATION
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16 I. INTRODUCTION AND SUMMARY CONCLUSION

17 Plaintiff David V. Garrison appeals the final decision of the Commissioner of the Social
18 Security Administration (“Commissioner”) that denied his applications for Disability Insurance
19 Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the
20 Social Security Act after a hearing before an administrative law judge (“ALJ”). For the
21 reasons set forth below, the Court recommends reversing this case and remanding for further
22 administrative proceedings.

23 II. FACTS AND PROCEDURAL HISTORY

24 Plaintiff is a forty-seven-year-old man with a high school education and lengthy work
25 history that includes customer-service representative, service-dispatch manager, service-order
26 writer, and casino manager. AR 43, 68, 78-85, 271. He has a long history of intermittent

01 anxiety-related impairments that have caused him to miss work and that appear to have
02 worsened over time. AR 62. Plaintiff alleges that these impairments became so severe that he
03 was forced to stop working on March 31, 2003. Since then, he has lived with two of his
04 children and subsisted primarily off of various forms of public assistance. AR 236B-D, 250-
05 51, 255.

06 Plaintiff applied for DIB on March 31, 2003, and SSI on August 22, 2003. AR 43-45,
07 236A-E. He alleged disability beginning on June 1, 1987, as a result of anxiety disorder, panic
08 attacks, hypertension, and diabetes. AR 62. Subsequently, plaintiff amended his onset date to
09 March 31, 2003, the last day he worked. AR 256-57. Plaintiff's applications were denied
10 both initially and upon reconsideration. AR 30-37.

11 On April 6, 2005, an administrative hearing was held before an ALJ. AR 244-78. On
12 April 22, 2005, the ALJ issued a decision finding plaintiff not disabled. AR 19-20. He found
13 that plaintiff's impairments prevented him from performing his past relevant work, but despite
14 plaintiff's limitations, determined that he could perform other jobs in the national economy.
15 AR 19-20. Plaintiff appealed the decision, but the Appeals Council declined review. AR 6-8.
16 Therefore, the ALJ's April 22, 2005, decision serves as the Commissioner's final decision for
17 purposes of this Court's review. On September 2, 2005, plaintiff timely filed this action
18 challenging the Commissioner's final decision. Dkt. No. 3.

19 III. JURISDICTION

20 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §§
21 405(g) and 1383(c)(3) (2005).

22 IV. STANDARD OF REVIEW

23 The court may set aside the Commissioner's denial of social security benefits when the
24 ALL's findings are based on legal error or not supported by substantial evidence in the record
25 as a whole. *See* 42 U.S.C. § 405(g); *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993);
26 *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is defined as

01 more than a mere scintilla but less than a preponderance; it is such relevant evidence as a
02 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*,
03 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility,
04 resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53
05 F.3d 1035, 1039 (9th Cir. 1995). Where the evidence is susceptible to more than one rational
06 interpretation, it is the Commissioner's conclusion that must be upheld. *Thomas v. Barnhart*,
07 278 F.3d 947, 954 (9th Cir. 2002) (internal citations omitted).

08 V. EVALUATING DISABILITY

09 As the claimant, Mr. Garrison bears the burden of proving that he is disabled within the
10 meaning of the Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999)
11 (internal citations omitted). Disability is defined as the "inability to engage in any substantial
12 gainful activity by reason of any medically-determinable physical or mental impairment, which
13 can be expected to result in death, or which has lasted or can be expected to last for a
14 continuous period of not less than twelve months[.]" 42 U.S.C. §§ 423(d)(1)(A),
15 1382c(a)(3)(A). A claimant is disabled only if his impairments are of such severity that he is
16 not able to do his previous work, and cannot, considering his age, education, and work
17 experience, engage in any other substantial gainful activity existing in the national economy.
18 See 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); See also *Tackett v. Apfel*, 180 F.3d 1094,
19 1098-99 (9th Cir. 1999).

20 The Social Security regulations set out a five-step sequential- evaluation process for
21 determining whether a claimant is disabled within the meaning of the Social Security Act. See
22 20 C.F.R. §§ 404.1520, 416.920. At step one, the claimant must establish that he is not
23 engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). If the
24 claimant establishes that he has not engaged in any substantial gainful activity, the
25 Commissioner proceeds to step two. At step two, the claimant must establish that he has one
26 or more medically-severe impairments, or combination of impairments, that limit his physical

01 or mental ability to do basic work activities. If the claimant does not have such impairments,
02 he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
03 impairment, the Commissioner moves to step three to determine whether the impairment
04 meets or equals any of the listed impairments described in the regulations. 20 C.F.R. §§
05 404.1520(d), 416.920(d). A claimant who meets or equals one of the listings for the required
06 twelve-month-duration requirement is disabled. *Id.*

07 When the claimant's impairment neither meets nor equals one of the impairments listed
08 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's
09 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
10 Commissioner evaluates the physical and mental demands of the claimant's past relevant work
11 to determine whether the claimant can still perform that work. 20 C.F.R. §§ 404.1520(f),
12 416.920(f). If the claimant is not able to perform his past relevant work, the burden shifts to
13 the Commissioner at step five to show that the claimant can perform some other work that
14 exists in significant numbers in the national economy, taking into consideration the claimant's
15 RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett*,
16 180 F.3d at 1100. If the Commissioner finds the claimant is unable to perform other work,
17 then the claimant is found disabled and benefits may be awarded.

18 VI. DECISION BELOW

19 On April 22, 2005, the ALJ issued a decision finding:

- 20 1. The claimant met the disability insured status requirements of the Act
21 on March 31, 2003, the date the claimant stated he became unable to
work, and continues to meet them through the date of this decision.
- 22 2. The claimant has not engaged in substantial gainful activity since March
23 31, 2003.
- 24 3. The medical evidence establishes that the claimant has hypertension,
25 diabetes and Panic Disorder with Agoraphobia, but that he does not
26 have an impairment of combination of impairments listed in, or
medically equal to one listed in Appendix 1, Subpart P, Regulations No.
4.

4. Claimant's allegations are only partially credible for the reasons set forth in the body of this decision.
5. The claimant has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for the following limitations: moderate limits in completing a normal workday and workweek without interruptions from psychologically based symptoms and performing at a consistent pace, interacting appropriately with the general public, and responding appropriately to changes in the work setting. (20 CFR 404.1545 and 416.945).
6. The claimant is unable to perform past relevant work as a customer service representative and dispatcher.
7. The claimant's residual functional capacity for the full range of medium work is reduced by the limitations in number 5.
8. The claimant is 46 years old, which is defined as a "younger individual" (20 CFR 404.1563 and 416.963).
9. The claimant has a high school education. (20 CFR 404.1564 and 416.964).
10. The claimant has no transferable skills as the vocational expert testified.
11. Based on an exertional capacity for medium work and the claimant's age, education, and work experience, section 404.1569 of Regulations No. 4 and section 416.969 of Regulations No. 16 and Rule 203.29, Table No. 3, of Appendix 2, Subpart P, Regulations No. 4 would direct a conclusion of "not disabled."
12. Although he is unable to perform a full range of medium work Rule 203.29 used as a framework for decision making directs a finding of "not disabled" since there are still a significant number of other jobs in the national economy that claimant can perform as set forth in the body of this decision.
13. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(g) and 416.920(g)).

AR 19-20.

VII. ISSUES ON APPEAL

Plaintiff raises several issues in support of his argument that this case should be reversed and remanded for further administrative proceedings:

1. Did the ALJ erroneously reject the medical opinion of treating physician Fink?;

2. Did the ALJ erroneously reject plaintiff's testimony?;
3. Did the ALJ improperly ignore witness statements?;
4. Did the ALJ err in his RFC by failing to determine whether plaintiff could work on a "Regular and Continuing Basis?"; and
5. Did the ALJ err by propounding an inaccurate hypothetical?

VIII. DISCUSSION

A. The ALJ Did Not Erroneously Reject the Medical Opinions of Treating Psychiatrist Robert Fink.

Plaintiff argues that the ALJ erred by rejecting the medical opinions of treating psychiatrist Robert Fink, M.D., without providing legally sufficient reasons for doing so. Op. Br. at 13. He urges the Court to credit Dr. Fink's opinions concerning plaintiff's functional limitations as true. *Id.* at 17.

Dr. Fink is a psychiatrist who treated plaintiff on five occasions from November 10, 2003, to January 18, 2005. AR 202-03. His records include a January 18, 2005, Medical Source Statement form that addressed the nature and severity of plaintiff's mental impairments. AR 197-200. Dr. Fink found that plaintiff had marked limitations in several functional areas, including the ability to maintain attention and concentration for extended periods, the ability to perform activities within a schedule, maintain attendance and be punctual, the ability to work in proximity to others without distraction, and the ability to complete a normal work schedule without interruption from psychologically-based symptoms. AR 197-98. He also opined that plaintiff would have marked limitations in all but one subcategory of social interaction. AR 198-99. Dr. Fink concluded that these limitations had existed since 2002. AR 199.

The ALJ stated that he "disagree[d] with Dr. Fink's more restrictive assessments[,] and instead preferred the less restrictive limitations offered by other physicians. AR 17-18. Because Dr. Fink's opinions relating to plaintiff's limitations were inconsistent

01 with those in other medical opinions, the ALJ was obligated to provide specific and legitimate
02 reasons for rejecting them.¹ *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (internal
03 citations omitted).

04 The ALJ satisfied his burden. First, he pointed out that plaintiff received treatment
05 from Dr. Fink on an infrequent basis — once every several months — and that his treatment
06 notes were limited. AR 17-18. Contrary to plaintiff's assertions, this was not an improper
07 justification. The treatment records from Dr. Fink reflect only five visits between March 4,
08 2004, and January 18, 2005, and consist of approximately one-half of a handwritten page for
09 each entry. AR 204-06. These opinions offer almost no information relating to the extent of
10 plaintiff's limitations and, therefore, are of little value.²

11 Second, the ALJ noted that the marked limitations Dr. Fink assigned were inconsistent
12 with plaintiff's reports that his anxiety levels improved with medication (which he continued
13 during treatment with Dr. Fink) and his activities of daily living. AR 18. Notes from Dr.
14 Herron, plaintiff's treating physician, support the assertion that plaintiff was improving with
15 medication. AR 159, 165. Similarly, plaintiff's testimony that he went to the gym, performed
16 household chores, and could get around town also supports the ALJ's decision. AR 252-55.
17 Plaintiff argues that his activities were very limited and designed to avoid people and stressful

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19 ¹Plaintiff does not specify whether Dr. Fink's opinion was contradicted or
20 uncontradicted, but he does concede that it differs from other medical opinions as to the
21 severity of plaintiff's functional limitations. The Court agrees. Therefore, the specific and
legitimate standard is appropriate. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)
(internal citations omitted).

22 ²Plaintiff argues that the ALJ should have ordered further development of these
23 records. Although the ALJ must seek additional evidence or clarification from a treating
24 physician when it is vague or conflicting, that duty "is triggered only when the evidence from
the treating medical source is inadequate to make a determination as to the claimant's
25 disability." 20 C.F.R. § 416.912(e); *see also* SSR 96-5p; *Thomas*, 278 F.3d at 958. Here, Dr.
26 Fink's treatment notes were somewhat vague, but the Medical Source Statement he provided
was thorough and clear as to his views on plaintiff's condition. Thus, the ALJ was not
required to develop the record further.

01 situations. Op. Br. at 15. This assertion is not inconsistent with the record, but when two
02 interpretations are reasonable, as is the case here, it is the ALJ's that must be upheld. *Thomas*,
03 278 F.3d at 954.

04 Finally, and perhaps most persuasively, the ALJ stated that he assigned greater weight
05 to the opinions of Dr. Herron and the State examining physicians, Drs. Reade and Nelson,
06 because they were more descriptive and "more consistent with claimant's history and
07 treatment of anxiety" than Dr. Fink's opinion. AR 18. The ALJ's thorough evaluation of the
08 medical evidence belies plaintiff's assertion that this statement is conclusory. The ALJ
09 interpreted more than twenty-five pages of Dr. Herron's treatment notes to paint a picture of a
10 man with a manageable impairment. Indeed, Dr. Herron's notes repeatedly refer to plaintiff's
11 continual improvement and attempts to work, but acknowledge continued symptoms. *See* AR
12 150, 162, 164-65, 172, 175. This is consistent with the long-term history of plaintiff's illness
13 as well. AR 62. Moreover, the State physicians reviewed these notes and concluded that
14 plaintiff had only mild-to-moderate limitations. AR 176-93. They opined that he could
15 perform certain tasks with limited exposure to the public and only a few coworkers. AR 192-
16 93. While the Court is sympathetic to alternative interpretations of the evidence, the ALJ's
17 evaluation of the evidence was reasonable and, therefore, must be upheld. *Thomas*, 278 F.3d
18 at 954.

19 Plaintiff asserts that the ALJ should have given Dr. Fink's opinions more weight
20 because he is a psychiatrist, whereas Dr. Herron is a general practitioner. Op. Br. at 15.
21 Generally, the ALJ will prefer the opinions of treating physicians, particularly when those
22 opinions relate to medical areas within their area of specialization. 20 C.F.R. §§
23 404.1527(d)(5); 416.927(d)(5); *Benecke v. Barnhart*, 379 F.3d 587, 594 n.4 (9th Cir. 2004).
24 However, treating physician opinions "may be entitled to little if any weight" when they are
25 inadequately supported by treatment notes, or when the physician has not seen the patient
26 frequently enough to support a reliable "longitudinal picture" of the plaintiff's impairments.

01 *Holohan v. Massanari*, 246 F.3d 1195, 1203 n.2 (9th Cir. 2001) (internal citations omitted).
02 In this case, the ALJ properly explained that Dr. Fink's opinions were entitled to less weight
03 because they were poorly supported and because they were based on infrequent visits. These
04 reasons appropriately reinforce the decision of the ALJ to prefer the more thoroughly
05 supported opinions of other treating and examining physicians.

06 B. The ALJ Erroneously Rejected Plaintiff's Testimony.

07 Plaintiff argues that the ALJ erred failing to give clear and convincing reasons for
08 rejecting his testimony.³ Op. Br. at 18. Once a claimant produces medical evidence of an
09 underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity of
10 symptoms solely because they are unsupported by objective medical evidence. *Reddick*, 157
11 F.3d at 722 (internal citations omitted). Absent affirmative evidence showing that the claimant
12 is malingering, the ALJ must provide clear and convincing reasons for rejecting the claimant's
13 testimony. *Id.* "General findings are insufficient; rather, the ALJ must identify what testimony
14 is not credible and what evidence undermines the claimant's complaints."⁴ *Id.*

15 In this case, the ALJ concluded that plaintiff's testimony referring to the symptoms of
16 his anxiety and panic disorders was "only partially credible." AR 17. His analysis then quickly
17 moved into an evaluation of the medical evidence. In doing so, the ALJ did not link up the
18 facts he found to discredit portions of plaintiff's testimony. Rather, the ALJ only generalized
19 that the medical record as a whole was inconsistent with plaintiff's entire testimony. This fails
20 to satisfy the *Reddick* standard for evaluating plaintiff's testimony. On remand, the ALJ is

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22 ³Here, there is no dispute that plaintiff suffered from anxiety and panic disorders, and there
23 is no suggestion of malingering. Accordingly, the ALJ was obligated to provide clear and
24 convincing reasons for rejecting plaintiff's testimony. The Commissioner does not dispute this.

25 ⁴The ALJ may consider ordinary techniques of credibility evaluation, including a
26 reputation for truthfulness, inconsistencies in testimony, or between testimony and conduct, daily
activities, work record, and testimony from physicians and third parties concerning the nature,
severity, and effect of the symptoms of which he complains. *Light v. Social Sec. Admin.*, 119
F.3d 789, 792 (9th Cir. 1997) (internal citations omitted).

01 directed to consider all of plaintiff's testimony, and if some or all of it is to be rejected, the
02 ALJ is directed to provide clear and convincing reasons for doing so.

03 C. The ALJ Erroneously Ignored Witness Statements.

04 Plaintiff's wife and daughters each submitted written statements to Disability
05 Determination Services ("DDS") regarding the nature and extent of plaintiff's impairments.
06 AR 86-95, 103-07. The parties agree that the ALJ made no mention of these statements.
07 Plaintiff argues that this was error and that the statements should be credited as true. Op. Br.
08 at 20-21.

09 Lay-witness testimony as to a plaintiff's symptoms or how an impairment affects one's
10 ability to work is competent evidence that cannot be disregarded without comment. 20 C.F.R.
11 §§ 404.1513(d)(4), 416.913(d)(4); *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). To
12 discount lay-witness testimony, the ALJ must "provide reasons germane to each witness." *Id.*
13 Therefore, the ALJ erred by failing to provide any reasons or analysis for these statements.

14 The Commissioner concedes that the ALJ's decision did not address these statements,
15 but argues that even if credited as true, they do not contradict the ALJ's findings. Def. Br. at
16 6. Her argument is that the omitted statements would add little, if any, to plaintiff's RFC.
17 However, the conclusion urged by the Commissioner is not self-evident. For instance,
18 plaintiff's daughter indicated that plaintiff "can't focus on things periodically," that he had
19 "sleepiness, dizziness, [and] confusion," and that he seemed "anxious or sleepy pretty much all
20 of the time." AR 86-90. Similarly, his wife testified that plaintiff had "trouble dealing with
21 stress, dizziness, inability to make decisions, [and] depression[.]" AR 91. She also stated that
22 he "can't seem to focus," often seems "anxious [or] worried," and "doesn't go out much."
23 AR 91-92. The ALJ concluded that plaintiff had an RFC that included "moderate limits in
24 completing a normal workday and workweek without interruptions from psychologically based
25 symptoms and performing at a consistent pace, interacting appropriately with the general
26 public, and responding appropriately to changes in the work setting." AR 19. Nothing in the

record indicates that the RFC analysis takes into account the complete limitations suggested by the witnesses. Because this matter is to be remanded for further review of the adverse credibility determination, the ALJ is also directed to evaluate the witness statements as well.

D. The ALJ Should Explicitly Assess Plaintiff's Ability to Work on a "Regular and Continuing Basis."

RFC is the "maximum degree to which [a plaintiff] retains the capacity for sustained performance of the physical-mental requirements of jobs." 20 C.F.R. 404, Subpt. P, App. 2 § 200(c). It is an administrative decision as to the most a plaintiff can do, despite his limitations. SSR 96-8p. The ALJ must assess all of the relevant evidence, including evidence regarding symptoms that are not severe, to determine if the claimant retains the ability to work on a "regular and continuing basis," *e.g.*, eight hours a day, five days a week. *Reddick*, 157 F.3d at 724; *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995); SSR 96-8p. Plaintiff argues that the ALJ's RFC determination was deficient because it failed to assess his ability to work on a regular and continuing basis. Op. Br. at 22. He also argues that the RFC did not consider all of the evidence of the record. *Id.* at 23.

In this case, the ALJ found that plaintiff retained

the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for the following limitations: moderate limits in completing a normal workday and workweek without interruptions from psychologically based symptoms and performing at a consistent pace, interacting appropriately with the general public, and responding appropriately to changes in the work setting

AR 19. Although the RFC made no explicit reference to plaintiff's ability to work on a "regular and continuing basis," that finding could be implied from his RFC determination.

Because the ALJ erred in other portions of his decision, he should make a more explicit finding relevant to plaintiff's ability to perform work on a regular and continuing basis, taking into account the testimony of plaintiff and lay-witnesses. This finding is particularly

important in this case because of the waxing-waning nature of plaintiff's impairment. *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995) (noting that occasional symptom-free periods, or attempts at work, do not preclude a finding of disability). In other words, a clear finding on this issue is important because plaintiff's ability to consistently control his anxiety so that he can cope with work-related stressors, focus on tasks, and maintain attendance, is a key question at issue.

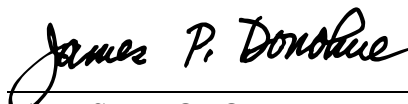
E. The ALJ's Hypothetical Question.

Finally, plaintiff argues that the ALJ's hypothetical was deficient. Op. Br. at 24. In light of the foregoing errors, it is not necessary to explore this assertion of error in detail. The fact that the ALJ erred in the evaluation of plaintiff's testimony and the witnesses' testimony suggests the hypothetical may not have taken into account all of the limitations faced by the plaintiff. To the extent that the plaintiff's limitations are modified upon remand, the ALJ should propound a new hypothetical that incorporates the erroneously rejected testimony.

IX. CONCLUSION

For the reasons discussed above, this case should be reversed and remanded for further administrative proceedings not inconsistent with this report and recommendation. In particular, the ALJ should reassess the testimony of plaintiff and several of the lay witnesses. Additionally, the ALJ should clarify plaintiff's ability to work on a regular and continuing basis. Finally, the ALJ should propound a hypothetical that takes into account all of plaintiff's limitations found after considering this additional evidence. A proposed order accompanies this report and recommendation.

DATED this 15th day of June, 2006.


JAMES P. DONOHUE
United States Magistrate Judge